(15)

No. 03-526

Supreme Court, U.S.
FILED
FEB 26 2004
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,
Petitioner

v.

WARREN WESLEY SUMMERLIN

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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FEBRUARY 26, 2004

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 individual members nationwide and 28,000 affiliate members in 50 States, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates. The NACDL was founded in 1958 to promote research of criminal law issues, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal habeas corpus. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal justice issues.

SUMMARY OF ARGUMENT

A. This Court's framework for determining retroactive application of constitutional rules on collateral review under *Teague v. Lane*, 489 U.S. 288 (1989), is based on a series of legal determinations regarding the nature of the claim at issue. In adopting that framework, the Court expressly discarded its earlier, multi-factor balancing test for determining retroactivity. The State and its *amici* nonetheless suggest that one reason for the Court to refuse to apply *Ring v. Arizona*, 536 U.S. 584 (2002), retroactively

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[1] Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court, pursuant to Supreme Court Rule 37.3(a). No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

under *Teague* is because of what they claim will be the significant number of defendants affected by such a ruling, especially to the extent *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would also be applied retroactively. But such concern about the effect on other defendants was one of the factors that caused difficulties under the pre-*Teague* balancing test, involving as it did more policy judgments than legal principles, thereby undermining consistency and predictability. Thus, the Court should reject the invitation to rely on speculative and unsubstantiated concerns about the effect on other defendants as a basis for denying retroactivity of *Ring* or *Apprendi*.

B. *Teague* does not bar the application on collateral review of the constitutional rules articulated in *Ring* and *Apprendi* because both are rules of substance, not procedure. After *Apprendi*, a court has two options when confronted with a statute that increases the statutorily authorized maximum sentence based on a particular fact. On the one hand, a court may interpret the statute and construe the fact to be an element of the offense that must be submitted to the jury. Such an interpretation goes to the substance of what constitutes the crime. The Court's decisions in *Bousley v. United States*, 523 U.S. 614 (1998) and *Fiore v. White*, 531 U.S. 225 (2001), illustrate that persons previously convicted under an erroneous interpretation of the statute are entitled to retroactive application of the correct interpretation.

On the other hand, a court may interpret the statute to preclude submission of the fact to a jury. The court would then be required under the Supremacy Clause to declare unconstitutional any portion of the statute that authorized reliance on the judge-found fact to increase the statutory maximum sentence. The substance of the offense would have changed and the State would be unable to sentence persons to the aggravated version of the crime that bears the increased maximum sentence, again yielding a substantive ruling.

C. The substantive rules of *Ring* and *Apprendi* also trigger a range of fundamental procedural protections and even if the Court were to deem the rules to be only procedural, *Teague* does not prohibit their application on collateral review. By expanding the scope of certain fundamental procedural protections that enhance the accuracy of convictions, *Ring* and *Apprendi* reflect a revised understanding of the application and scope of those bedrock procedural elements and therefore constitute a watershed change in constitutional law.

Ring and *Apprendi* are not just about who decides a certain fact necessary to conviction of an aggravated offense. *Apprendi* also held that the prosecution must prove such fact beyond a reasonable doubt. The burden of proof "is a prime instrument for reducing the risk of convictions resting on factual error." *In re Winship*, 397 U.S. 358, 363 (1970). And the rules of *Ring* and *Apprendi* also trigger the Sixth Amendment's Confrontation Clause, which enhances the accuracy of criminal convictions by restricting the prosecution's use of evidence traditionally viewed as unreliable and guaranteeing defendants the right to cross-examine witnesses. Consequently, this Court held that its cases involving both the reasonable-doubt standard and the Confrontation Clause were to be given retroactive effect. *See, e.g., Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Berger v. California*, 393 U.S. 314, 315 (1969).

The right to a jury determination of guilt also increases the accuracy of the proceeding. This Court recognized this in *Ballew v. Georgia*, 435 U.S. 223, 232 (1978), when it struck down the use of five-member juries because the reduction in jurors "leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." Although the Court did not retroactively apply another case holding that the jury trial right applies to the States, that determination was based on a pre-*Teague* ad hoc balancing analysis. More relevant is *Brown v. Louisiana*, 447 U.S. 323, 334 (1980), where the

Court gave retroactive effect to the rule requiring a unanimous six-person jury in state criminal trials because the rule implicated "the very integrity of the fact-finding process." That is true of *Ring* and *Apprendi* as well.

D. Although irrelevant to the *Teague* analysis, the State and its *amici* overstate the likely impact that retroactivity of *Ring* and *Apprendi* would have in habeas corpus litigation. They disregard the numerous hurdles under the procedural default doctrine and congressional amendments to the federal habeas corpus statute that must be overcome by a criminal defendant seeking collateral relief.

Even with regard to the significant number of convictions under the principal federal drug statute, 21 U.S.C. § 841, the retroactive application of *Apprendi* would not place an unwarranted burden on the administration of justice. *Apprendi* does not undermine any maximum sentence increased based on a prior conviction in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *Apprendi* also does not affect an increase in a statutory mandatory minimum sentence that does not also increase the statutory maximum sentence.

Even among the courts that have found *Apprendi* retroactive, relief has been uncommon. In some Section 841 cases, courts have found no *Apprendi* error because the type and quantity of drugs had been submitted to the jury. Other courts have denied habeas relief because they have concluded that the jury could have found the quantity beyond a reasonable doubt. Other courts have relied on other counts of conviction that increased the maximum sentence beyond that imposed. Still others have found *Apprendi* error irrelevant because the sentence imposed did not exceed the 20-year statutory maximum sentence for the lesser offense under 21 U.S.C. § 841(b)(1)(C).

Thus, Section 841 cases are a far cry from cases under *Bousley*, *supra*, where every prisoner could make a threshold showing of prejudice because the statute mandated a consecutive five-year sentence. Yet, even with

the federal government's widespread reliance on the statute at issue in *Bousley*, neither the State nor the federal government demonstrate that collateral proceedings under that ruling constituted an unwarranted burden on the administration of justice. Similarly, the *amici* States fail to identify significant actual or likely effects from retroactivity of *Apprendi*, despite one *amicus* State's application of *Apprendi* retroactively in state habeas proceedings for more than two years.

ARGUMENT

RESPONDENT IS ENTITLED TO HABEAS CORPUS RELIEF ON HIS SIXTH AMENDMENT CLAIM

Petitioner, the Director of the Department of Corrections for the State of Arizona ("State"), asks this Court to hold that *Ring v. Arizona*, 536 U.S. 584 (2002), should not be applied to respondent's petition for federal habeas corpus relief challenging his sentence of death. The State argues that application of *Ring* to respondent's case would constitute a retroactive application of law on collateral review contrary to the doctrine established by the Court in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny. One of the State's arguments is that retroactive application of *Ring* would mean that *Apprendi v. New Jersey*, 530 U.S. 466 (2000), would likewise apply retroactively in federal habeas proceedings, and that the Court must avoid the "additional litigation" and "confusion" that would result from such a ruling. Pet. Br. 9, 32; *see also* U.S. Br. 13-14 & n.1 (arguing question of the retroactivity of *Apprendi* as well as that of *Ring*); Br. of Nebraska and 15 Other States as *Amici Curiae* 20-21.

The court of appeals correctly held that the rule of constitutional law announced in *Ring* should be applied retroactively even if the rule of constitutional law announced in *Apprendi* is not. The NACDL demonstrates below, however, that *Apprendi* also meets this Court's requirements for retroactive application under *Teague*. And the NACDL believes that the State and its *amici* overstate the likely

impact that retroactivity of *Apprendi* would have in habeas corpus litigation. As the NACDL will explain, even with regard to the significant number of convictions under the principal federal drug statute, 21 U.S.C. § 841, the retroactive application of *Apprendi* would not place an undue burden on the administration of justice. In any event, concern over such collateral consequences from a retroactivity ruling should not alter the result of a *Teague* analysis generally, and certainly should not in this case involving a defendant sentenced to death in violation of the Sixth Amendment.

A. *Teague* Is Rooted In The Nature Of The Constitutional Ruling At Issue And Does Not Vary Depending On Concerns About The Effect Of A Retroactivity Ruling On Other Cases

1. a. This Court has held that a rule of constitutional law announced in a case applies retroactively to cases pending on direct review at the time the rule is announced, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), and also to cases on federal habeas corpus relief if, in the latter circumstance, the rule is not new or is substantive. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302 (1989) (rules that are not new); *Bousley v. United States*, 523 U.S. 614 (1998) (rules that are substantive).

With regard to constitutional rulings that are new and procedural, the Court in *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion), and *Penry* added another aspect to that analytical framework to guide courts in determining whether a criminal defendant with such a claim is entitled to habeas corpus relief. This retroactivity framework is based on a series of legal determinations regarding the nature of the claim at issue, including whether the rule removes certain

primary conduct from criminal sanctions, and whether the rule involves bedrock procedural protections.[2]

In adopting this legal framework, the *Teague* Court expressly discarded a multi-factor balancing test for determining retroactivity. That earlier balancing test had weighed, *inter alia*, "the reliance of the States on prior law, and the effect on the administration of justice of a retroactive application of the [new] rule." *Teague*, 489 U.S. at 302. Such considerations were taken into account in the *Teague* rule itself, by its distinguishing between cases on direct appeal and collateral attack and its narrow exceptions.

One reason for *Teague*'s express abandonment of the Court's prior balancing test was the difficulty experienced by the Court in determining, with any sense of accuracy, the actual effect that a new rule would have on the administration of justice. *See id.* at 302-304 (plurality). Justice Harlan's separate opinions in earlier cases, which were precursors for the *Teague* rule, identified such difficulties as the reason that a change in the standard was necessary. He explained that the former retroactivity doctrine that relied on a balancing test "bespeaks more

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[2] Specifically, a court determining whether a constitutional rule should be applied in a federal habeas proceeding must determine: (1) if the defendant is seeking application of a "new" rule that was not in existence at the time his case became final on direct appeal or, instead, is merely seeking application of a rule dictated by past precedent, in which case it will apply in habeas proceedings, *Penry*, 492 U.S. at 314; (2) if the rule is new, whether it is a "substantive" rule, in which case it will apply in habeas proceedings, *Bousley*, 523 U.S. at 620; (3) if the new rule is procedural, instead of substantive, whether it comes within (a) the exception for rules that "place[] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," *Penry*, 492 U.S. at 329 (internal quotation marks omitted); or (b) the exception for rules that "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding" when "[i]nfringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction," *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotations marks omitted).

considerations of policy than of legal principle." *Mackey v. United States*, 401 U.S. 667, 700 (1971) (separate opinion of Harlan, J.). He also noted that decisions regarding retroactivity were used by some members of the Court to revisit the underlying merits of the previously announced decisions, leading to "incompatible rules and inconsistent principles." *Desist v. United States*, 394 U.S. 244, 258 (1969) (separate opinion of Harlan, J.).

b. The difficulty of making a determination about the actual effect of a new rule on cases pending on collateral review has multiplied in light of Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. AEDPA imposed, in addition to the *Teague* retroactivity rule, new procedural and substantive barriers for state and federal prisoners seeking to challenge a conviction or sentence through a federal habeas corpus petition. Although respondent's petition is not governed by AEDPA (because it was filed before the statute's effective date), AEDPA's limitations on both first and successive habeas petitions would need to be considered if the Court were to take into account in this case the practical effect that any *Ring* or *Apprendi* retroactively ruling would have in other instances.

2. This Court's adoption of *Teague*'s legal rules to avoid reliance on speculative policy concerns about the number of cases that could be affected in determining the applicability of federal law in habeas corpus proceedings is consistent with the Court's other habeas corpus doctrines. The Court has held that interests in finality and comity require that, in certain circumstances, a criminal defendant's federal constitutional claims, even though meritorious, be denied in a habeas corpus proceeding. That is so even if a defendant will be executed notwithstanding the constitutional error. The weightiness of that result – that persons can be put to death even when the government engages in unconstitutional conduct – means that close scrutiny must be given to the rules, particularly court-created rules, that would bar relief

under such circumstances and that the Court's speculation about the possible effect on other cases not dictate the result.

Thus, arguments of the State (Pet. Br. 9, 31-34) and its *amici* that the retroactive application of *Ring* and *Apprendi* on collateral review would impose societal costs and strain the judicial system should not undermine this Court's determination that the rules of *Ring* and *Apprendi* meet the *Teague* criteria for retroactivity. Relying on concerns regarding the potential impact of *Ring*'s retroactivity would be especially inappropriate in the instant case where respondent raised the constitutional issue as early as 1984 on his direct appeal, and it was erroneously rejected by the state court based on a misreading of this Court's precedent, all of which predated this Court's rulings that put his claim into question. *See State v. Summerlin*, 675 P.2d 686, 695 (Ariz. 1984) (misreading *Proffitt v. Florida*, 428 U.S. 242 (1976), to require rejection of respondent's Sixth Amendment claim).

It would cause even greater damage to the *Teague* analysis to accept the State's invitation to rely on speculation about the effect that the possible retroactive application of another case, *i.e.*, *Apprendi*, may have. Although members of the Court expressed concern about *Apprendi*'s effect, including its effect on convictions under the federal drug statutes, with regard to determining whether to recognize the underlying constitutional right, *see Apprendi*, 530 U.S. at 551 (O'Connor, J., dissenting); *Ring*, 536 U.S. at 620-621 (O'Connor, J., dissenting), the retroactivity context requires a different analysis. The State is wrong to attempt to rely again on that issue in this context because *Ring* and *Apprendi* are now the law of the land. Disputes about the merits of those rules are no longer at issue and the Court must determine whether to apply them retroactively, as *Teague* requires, without resurrection of those concerns.

B. *Teague* Does Not Bar Application Of *Ring* Or *Apprendi* On Habeas Corpus Review Because Both Affect The Scope Of The Underlying Criminal Statute And Therefore Are Rules Of Substance

Under the standards developed in *Teague* and its progeny, the constitutional rule articulated by this Court in *Ring*, as well as the rule of *Apprendi*, should apply on collateral review because those rules are substantive, not procedural. The court of appeals correctly held that *Ring* governs issues of substance. The special circumstances of capital punishment would make *Ring* substantive even if *Apprendi* were not. But *Apprendi* is also substantive and therefore applies retroactively for reasons that apply to *Ring* as well, apart from the capital sentencing context.[3]

Apprendi held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum" is part of the criminal offense for purposes of the Sixth Amendment and thus "must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The State argues (Pet. Br. 19, 22-25) that this rule governs only procedural components of a trial – *i.e.*, the identity of the decision maker – and does not govern the substance of the underlying statute. That misconceives *Apprendi*.

After *Apprendi*, a court has two options when confronted with a statute that increases the statutorily authorized

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[3] The State and its *amici* suggest that this Court already has held that *Apprendi* is procedural rather than substantive within the meaning of *Teague*, and argue that the Court should necessarily hold that *Ring* is procedural as well, and therefore not retroactive. Pet. Br. 7, 13-16; *see also* U.S. Br. 13, 19. But they take the *Apprendi* Court's statement about "procedure" out of context. The *Apprendi* Court's explanation that the adequacy of the "procedure" of the state statute was at issue rather than the "substantive basis" of the statute, when correctly understood in light of the Court's immediately preceding sentence, merely referred to the fact that the substantive First Amendment issue regarding hate crime statutes was not before the Court. *See* 530 U.S. at 475.

maximum sentence based on a fact not found by a jury. Both those options demonstrate that the rule is substantive, and not merely procedural.

1. First, a court may interpret the statute at issue (under ordinary rules of statutory construction, in reliance on the rule of constitutional doubt, or otherwise) to construe the particular fact to be an element of the offense that must be submitted to the jury. *See, e.g., Castillo v. United States*, 530 U.S. 120 (2000); *Jones v. United States*, 526 U.S. 227 (1999). Persons previously convicted under erroneous interpretations of that statute, *i.e.*, interpretations that did not require proof of that fact beyond a reasonable doubt in order to convict, would be entitled to retroactive application of that interpretation. This is because the interpretation of the statute goes to the "substance" of what constitutes the crime. *See Apprendi*, 530 U.S. at 499 (Thomas, J., concurring); *Coleman v. United States*, 329 F.3d 77, 91 (2d Cir.) (B.D. Parker, J., concurring in judgment) ("The addition of an element naturally alters the meaning of a criminal statute."), *cert. denied*, 124 S. Ct. 840 (2003).

This Court's decision in *Bousley v. United States*, 523 U.S. 614 (1998), makes this point clear. In *Bousley*, the Court addressed whether its interpretation of a criminal statute in *Bailey v. United States*, 516 U.S. 137 (1995), should apply to persons whose convictions became final prior to the *Bailey* decision. *Bailey* had held, as a matter of statutory interpretation, that a conviction for "use" of a firearm under 18 U.S.C. § 924(c)(1) requires the government to show "active employment of the firearm." 516 U.S. at 144. In *Bousley*, the Court held that prisoners could rely on this interpretation to attack their convictions collaterally. The Court explained that its prior *Bailey* decision holding that a "criminal statute does not reach certain conduct" was "substantive" and thus the *Teague* bar against application to cases on collateral review was "inapplicable." 523 U.S. at 620.

The State suggests (Pet. Br. 12) that *Bousley*'s holding applies only to federal court interpretations of federal criminal laws. But the rationale of the Court is not so limited and there is no justification for so restricting it. The Court explained that it is the legislature, "and not the courts, which can make conduct criminal." *Id.* at 621. Thus, if a court determines, through interpretation of a statute, that the legislature did not intend to make certain conduct a crime (or intended certain conduct to constitute one crime rather than another), then a prior conviction rendered in contravention of that interpretation "necessarily carr[ies] a significant risk that a defendant stands convicted of 'an act that the law does not make criminal.'" *Id.* at 620. Such a conviction would contravene one of the "principal functions of habeas corpus," which is to "assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted." *Ibid.* The Court thus declined to extend the judicially-created *Teague* doctrine to bar such claims.

Indeed, without expressly addressing *Teague*, the Court made a similar holding with regard to the applicability on federal habeas review of a state court interpretation of a state statute in *Fiore v. White*, 531 U.S. 225 (2001). In *Fiore*, the Pennsylvania Supreme Court had interpreted a state criminal statute in an earlier case to require proof of certain conduct (*i.e.*, operating a hazardous waste facility without a permit). Fiore, who was convicted under that same state statute, but whose conviction was already final at the time of the decision, brought a federal habeas petition seeking to rely on the new state ruling interpreting the state statute. This Court unanimously held that, because the state court's decision was simply an interpretation of what the state criminal law had always meant, the new state court decision was the proper measure for determining the "element[s] of the crime of which Fiore was convicted" for purposes of determining the State's compliance with the Fourteenth Amendment. *Id.* at 229. The Court further concluded that Fiore was entitled to

habeas relief because there was insufficient evidence to show that he had committed "the elements of that crime beyond a reasonable doubt." *Ibid.*

Similarly, once a court interprets a statute in a manner that does not bring it into conflict with *Apprendi*, the application of that substantive interpretation of what constitutes a crime is not barred by *Teague* and can be relied upon in habeas proceedings even if the interpretation occurs subsequent to the conviction becoming final.

2. The alternative option available to a court faced with a statute that increases the statutorily authorized maximum sentence based on a particular fact is to interpret the statute to preclude the submission of the fact to a jury. A court may find such an approach dictated by the statutory text or legislative intent. If a criminal statute is read to call for a particular fact to be considered by the judge, rather than by the jury, and that fact (other than a prior conviction) would trigger an increased statutory maximum sentence, that portion of the statute as interpreted would be contrary to the Sixth and Fourteenth Amendments and, under *Apprendi*, would become inoperative. *See* U.S. Const. Art. VI, cl. 2 (Supremacy Clause). In that circumstance, the court must declare unconstitutional the portion of the statute authorizing reliance on the fact to increase the statutory maximum sentence (or the entire statute itself, if severance is not appropriate). Absent legislative action amending the statute to bring it into compliance with the Constitution, the State would be unable to sentence persons to the aggravated version of the crime that bears the increased maximum sentence.

Apprendi provides a good example of this. The New Jersey Supreme Court held that its legislature had intended, in the state criminal statute at issue, that a particular fact which increased the statutory maximum sentence not go before the jury, but be resolved by the judge alone. Accepting that interpretation of state law, this Court found

that the statute violated the Sixth and Fourteenth Amendments. But this Court did not reverse and remand with instructions to afford the defendant more process, nor to reduce the sentence to the maximum which would have applied without the unconstitutional enhancement based on the judge-found fact. Instead, the Court struck down the statute as unconstitutional and remanded for resentencing without use of the unconstitutional provision that increased the statutory maximum sentence. *See* 530 U.S. at 474, 491-492, 497; *see also State v. Kessler*, 73 P.3d 761, 772 (Kan. 2003) ("where the statutory procedure has been found unconstitutional [under *Apprendi*], the district court has no authority to impose such a sentence," even under procedures that comply with the Sixth Amendment). Similarly, on remand from this Court in *Ring*, the Arizona Supreme Court concluded that the "Supreme Court struck down Arizona's former capital sentencing statutes." *State v. Ring*, 65 P.3d 915, 933 (Ariz. 2003); *see also Woldt v. State*, 64 P.3d 256, 266-267 (Colo.) ("the statute under which [defendants] received their death sentences is unconstitutional on its face" after *Ring*), *cert. denied*, 124 S. Ct. 85 (2003).

It is true but irrelevant that a State can, in response to such a ruling, amend its statute so that, in the future, a jury would address the facts that trigger an increase in the statutory maximum. Any time a state criminal statute is struck down as unconstitutional, a State may enact an amended statute in an effort to overcome the constitutional infirmities. *See, e.g., Planned Parenthood Ass'n v. Ashcroft*, 462 U.S. 476, 492-493 & n.19 (1983) (upholding Missouri criminal statute regulating abortions for minors that Missouri enacted after original statute was declared unconstitutional as a matter of substantive due process in *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976)). That does not make the constitutional right at issue procedural, it simply shows that legislatures can respond to a constitutional ruling by adding elements to an offense that address the constitutional infirmity. *See Ring*, 536 U.S. at 606-607 (citing examples of

substantive constitutional rulings that could be remedied by the legislature through adding elements to a statute).

C. Even If *Ring* And *Apprendi* Are Treated As Only Procedural Rules, *Teague* Does Not Prohibit Their Application On Collateral Review Because They Involve Bedrock Rules That Enhance The Accuracy Of Convictions

Although the NACDL believes that it is clear that *Ring* and *Apprendi* involve substantive rules of constitutional law that are not barred by *Teague* from application on collateral review, we also address the alternative ground on which the court of appeals relied. We demonstrate that *Teague*'s second exception means that those rulings apply on habeas corpus even if they are deemed only procedural.

In assessing whether a rule falls within the second *Teague* exception, this Court has examined whether the rule "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Saffle v. Parks*, 494 U.S. 484, 495 (1990). This Court has repeatedly identified *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the paradigmatic example of a decision that satisfies the second *Teague* exception for retroactive application. *See, e.g., O'Dell v. Netherland*, 521 U.S. 151, 167 (1997); *Saffle*, 495 U.S. at 495. *Apprendi*, like *Gideon*, will in many criminal cases have a significant effect on the fairness of the trial and the accuracy of the result.

1. Because *Apprendi* establishes criteria for determining what facts constitute a part of a criminal offense, whether or not legislatively labeled "elements," it is substantive for the reasons set forth above. But it also triggers a range of fundamental procedural protections, including that the fact must be resolved by a jury, that the fact must be proven by the prosecution beyond a reasonable doubt, and that the fact must be proven using evidence that complies with the Confrontation Clause. *Cf. Washington v. Harper*, 494 U.S. 210, 220 (1990) (explaining that constitutionally required

procedures are influenced by contours of substantive constitutional right). The *Apprendi* rule, by expanding the scope of these fundamental procedural protections, reflects a revised understanding of the application and scope of all these rights, each of which is a bedrock procedural element. It thus constitutes a "watershed change in constitutional law." *Apprendi*, 530 U.S. at 524 (O'Connor, J., dissenting).

Significantly, the jury trial right serves to guard against arbitrary abuses of power by the State as a bedrock procedural matter in criminal law. The historical foundation of the right to a jury in criminal matters was "'[t]o guard against a spirit of oppression and tyranny on the part of rulers,' and [to serve] 'as the great bulwark of [our] civil and political liberties.'" *Apprendi*, 530 U.S. at 477 (quoting 2 Joseph Story, *Commentaries on the Constitution of the United States* 540-541 (4th ed. 1873)). Indeed, "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by impartial jurors * * * ." *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (internal quotation marks omitted). Thus, by expanding the scope of the jury's authority (and concomitantly limiting that of the legislature to remove issues from the jury's control), *Apprendi* expanded in a significant way our understanding of the Sixth Amendment right to a jury by rejecting judicial determination of facts leading to an increase in the statutory maximum as "an unacceptable departure from the jury tradition that is an indispensable part of our criminal justice system." *Apprendi*, 530 U.S. at 497.

2. The procedural consequences of *Ring* and *Apprendi* "implicat[e] the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495. *Ring* and *Apprendi* are not just about "who decides" under the Sixth Amendment, as the State and others have claimed. Pet. Br. 5, 7, 22-25; *see also* U.S. Br. 6, 7-8, 12, 15, 19-20. They also involve constitutional requirements about the level of proof necessary to support the particular factual finding at issue and the manner in which the decision is made,

including what evidence is admissible. These constitutional requirements all profoundly enhance fact-finding accuracy and reduce the risk of erroneous convictions.

a. Once a fact is determined, under either the rule of *Ring* or of *Apprendi*, to be part of a substantive offense that a jury must decide to authorize an increase in the statutory maximum sentence, the Constitution requires that the prosecution prove such a fact "beyond a reasonable doubt" in order to obtain a conviction. *Apprendi* repeatedly cited and discussed that constitutional requirement and the Court's relevant precedent, *e.g.*, *In re Winship*, 397 U.S. 358 (1970), ultimately ruling in an unequivocal manner that any fact (other than a prior conviction) that increases the statutory maximum punishment must not only be decided by a jury, but also be "proved beyond a reasonable doubt." 530 U.S. at 490; *see also id.* at 475-476 (noting that the question whether the defendant had a "constitutional right to have a jury find" the relevant fact "on the basis of proof beyond a reasonable doubt" was "starkly presented" in the case), 476, 477 n.3, 478, 484-485, 490. As the State acknowledges, the Court in *Ring* determined that *Apprendi*'s reasoning applies to the determination of aggravating factors in capital cases. Pet. Br. 14-15; U.S. Br. 26 n.5 (indicating that *Ring* requires proof beyond a reasonable doubt).

Thus, the State is wrong to suggest (Pet. Br. 7) that the rule of *Ring* does not affect "the quantum of proof necessary" to establish a fact that increases a statutory maximum. It is true that in *Ring* and in this case, the judge was required by Arizona law to apply a reasonable-doubt standard in determining the existence of the aggravating factors. *See Ring*, 536 U.S. at 597; U.S. Br. 26 n.5. The fortuity that state law already required the reasonable-doubt standard of proof in *Ring* and in this case does not alter the fact that, under *Ring* and *Apprendi*, that standard is now compelled as a federal constitutional matter.

Moreover, although the prior applicability of the standard in this particular case may be relevant in assessing whether

the constitutional violation warrants relief, the reality remains that, as a general matter, facts that are described as sentencing factors in noncapital cases, even if they affect the statutory maximum sentence, generally have been proved in the past by only a preponderance of the evidence standard. *See United States v. Watts*, 519 U.S. 148, 156 (1997) (per curiam). Indeed, the same low standard has sometimes been applied even in the capital context. In Montana, one of the other States that had allowed judges, rather than juries, to decide aggravating factors in capital cases, *see Ring*, 536 U.S. at 608 n.6, the judge was not required to find that the facts relating to the aggravating factors had been proved beyond a reasonable doubt. *See Fitzpatrick v. State*, 638 P.2d 1002, 1013, 1017 (Mont. 1981).

Thus, the rules of *Ring* and *Apprendi* will substantially improve the accuracy of fact-finding, as a general matter, by requiring that the relevant facts that increase a statutory maximum sentence be proved beyond a reasonable doubt. Increasing the burden of proof "is a prime instrument for reducing the risk of convictions resting on factual error." *Winship*, 397 U.S. at 363. Indeed, it is a constitutional requirement that applies even when a defendant waives a jury trial. The reasonable-doubt burden of proof goes directly to the accuracy of the ultimate determination. It requires a fact-finder to hold a sufficient level of confidence in the accuracy of its determination to warrant deprivation of physical liberty. *See Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 282 (1990) ("The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'").

Consequently, this Court held that its decisions in *Winship* and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), regarding the constitutional requirement of proof beyond a reasonable doubt in criminal cases were to be given

"complete retroactive effect." *Ivan V. v. City of New York*, 407 U.S. 203, 205 (1972); *Hankerson v. North Carolina*, 432 U.S. 233, 243 (1977). Although these cases were decided before *Teague*, their reasoning remains persuasive because they focused on precisely the question *Teague*'s second exception requires the Court to answer. As the Court explained in those cases, "the major purpose of the constitutional standard of proof beyond a reasonable doubt announced in *Winship* was to overcome an aspect of a criminal trial that substantially impairs the truth-finding function." *Ivan V.*, 407 U.S. at 205; *Hankerson*, 432 U.S. at 241. Indeed, in *Hankerson*, the Court declined to consider what the State argued would be the "devastating" impact on the "administration of justice" of holding *Mullaney* to be retroactive, explaining that "the reasonable-doubt standard of proof" removed such a "substantial" impediment to an accurate verdict that no balancing was appropriate, even under the pre-*Teague* retroactivity test. 432 U.S. at 243-244.

b. The rules of *Ring* and *Apprendi* also increase the accuracy of criminal convictions by triggering the Sixth Amendment's Confrontation Clause. Unlike in current sentencing proceedings, at which judges are generally free to consider hearsay and other evidence that would not be admissible at trial, s*ee Watts*, 519 U.S. at 156, the Sixth Amendment Confrontation Clause prohibits in criminal trials the admission of evidence that has traditionally been viewed as unreliable and guarantees defendants the right to cross-examine witnesses.[4] In this way, *Apprendi* extends the

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[4] The Due Process Clause imposes some limits, even at sentencing, on the use of hearsay evidence without providing a defendant an opportunity to rebut or challenge it. *See, e.g., Gardner v. Florida*, 430 U.S. 349 (1977); *Specht v. Patterson*, 386 U.S. 605 (1967). But the Court has yet to hold that the protections of the Sixth Amendment's Confrontation Clause apply to that portion of the criminal proceeding. *See Mitchell v. United States*, 526 U.S. 314, 337 (1999) (Scalia, J., dissenting) (suggesting that Sixth Amendment's Confrontation Clause does not extend to sentencing). *But cf. Mempa v. Rhay*, 389 U.S. 128,

protections of the Confrontation Clause. Like the reasonable-doubt burden of proof, this constitutional safeguard applies to the guilt determination regardless of who makes that decision.

"The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990). The Confrontation Clause generally precludes the prosecution from introducing out-of-court statements such as "ex parte affidavits," "depositions," and "confessions of accomplices" without the declarant being produced at trial. *Lilly v. Virginia*, 527 U.S. 116, 124-125 (1999). Although not all hearsay is excluded by the Sixth Amendment, the government may offer a declarant's out-of-court statement only if the declarant is unavailable and the statement is "sufficiently dependable," *i.e.*, "falls within a firmly rooted hearsay exception" or otherwise contains "particularized guarantees of trustworthiness." *Id.* at 124-125. This Court has long held that the Confrontation Clause's strong preference for live testimony is intended to provide the decision maker the ability to reach an accurate evaluation of the credibility of the witness. *See Mattox v. United States*, 156 U.S. 237, 242-243 (1895) (Confrontation Clause "compel[s] [the accuser] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.").

The Confrontation Clause also guarantees a criminal defendant the right to cross-examine the witnesses who testify against him at trial. *See Delaware v. Van Arsdall*, 475 U.S. 673 (1986). Cross-examination, in turn, has been described by this Court as "the 'greatest legal engine ever

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134 (1967) (Sixth Amendment grants defendant right to counsel at sentencing).

invented for the discovery of truth.'" *California v. Green*, 399 U.S. 149, 158 (1970) (footnote and citation omitted).

As with the reasonable-doubt standard announced in *Winship* and *Mullaney*, this Court applied its Confrontation Clause cases retroactively in the years preceding *Teague* based on their substantial importance to guaranteeing an accurate conviction. *See Berger v. California*, 393 U.S. 314, 315 (1969) ("one of the important objects of the right of confrontation [is] to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses" and thus "petitioner's inability to cross-examine [a witness] at trial may have had a significant effect on the 'integrity of the fact-finding process'"); *Roberts v. Russell*, 392 U.S. 293, 295 (1968) ("the constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined"). The same should be true of *Ring* and *Apprendi*, which expand the scope of the accuracy-enhancing procedures embodied in both the Due Process and Confrontation Clauses.

c. In addition to the constitutionally mandated reasonable-doubt standard of proof and the constitutional protections regarding reliable evidence and cross-examination, all of which are designed to reduce the risk of wrongful conviction, the right to a jury as the decision maker at the guilt phase of a criminal proceeding also increases the accuracy of the proceeding.

"[J]uries are [the] best judges of facts." *Sparf v. United States*, 156 U.S. 51, 65 (1895) (quoting *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794)). The inherent superiority of juries on questions of fact is at its height in the criminal context. *See* 3 William Blackstone, *Commentaries on the Laws of England* 379 (Cooley 4th ed. 1899). More specifically, juries were traditionally entrusted with determining the facts that made a defendant "subject to capital punishment." *Ring*, 536 U.S. at 599.

A jury, composed of multiple citizens, is a better fact-finder than a single judge because the process of group

deliberation significantly improves accuracy. This Court directly recognized that fact when, in *Ballew v. Georgia*, 435 U.S. 223, 232 (1978), it struck down the use of five-member juries because reducing the number of jury members "leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." Moreover, requiring consensus among a group reduces the possibility that faulty reasoning, caused by errors in logic or, as in the record in this case suggests, the use of illegal drugs, could taint the decision making process. Pet. App. A12 & nn.1 & 2 (discussing record support for claim that the state trial judge who presided over respondent's capital trial was later disbarred for substance abuse, "was either having difficulty concentrating or experiencing short-term memory loss" during his trial, and "made some quite perplexing, if not unintelligible, statements at various times during the trial").

The representative view of a jury is especially important when the facts under consideration require the application of moral judgments to historical facts. For example, in considering whether the State has proved whether a defendant's conduct was "heinous, cruel and depraved," a fact-finder must determine the relative brutality of the crime and the defendant. *See, e.g.*, *Walton v. Arizona*, 497 U.S. 639, 655 (1990) ("the proper degree of definition of an aggravating factor of this nature is not susceptible of mathematical precision"). Also, in considering whether the State has proved an aggravating factor of a prior felony conviction "involving the use or threatened use of violence on another person," Pet. App. A13, a fact-finder must consider the circumstances of the prior conviction, which in respondent's case involved the brandishing of a knife at a man who had struck respondent's wife with an automobile. *Id.* at A3.

The State notes (Pet. Br. 8, 27-28) that this Court in *DeStefano v. Woods*, 392 U.S. 631 (1968), ruled that the case holding that the Sixth Amendment jury-trial guarantee applied to the States was not retroactive. But *DeStefano*

employed the very ad hoc balancing test that this Court abandoned in *Teague*. It held that the undisputed aggregate increase in accuracy (and reduction in "arbitrariness and repression") was outweighed by its determination that prior non-compliance with the Sixth Amendment was so widespread that "*all* convictions for serious crimes in [Louisiana] and certain other States would be in jeopardy." *Id.* at 634 (emphasis added). More relevant to the *Teague* inquiry is the Court's subsequent decision in *Brown v. Louisiana*, 447 U.S. 323 (1980), in which the Court gave retroactive effect to the rule requiring a unanimous six-person jury in state criminal trials. The Court there stated that it is "difficult to envision a constitutional rule that more fundamentally implicates the fairness of the trial – the very integrity of the fact-finding process." *Id.* at 334 (plurality) (citation omitted). The same is true of *Ring* and *Apprendi*.

D. The State And Its Supporting *Amici* Overstate The Likely Impact That An Award Of Relief To Respondent Would Have By Ignoring The Limitations On Relief In Other Cases, Including Federal Drug Convictions Under 21 U.S.C. § 841

As noted at the outset of our argument, the State and its *amici* contend that one of the reasons that the rules of *Ring* and *Apprendi* should not be applied retroactively to cases on collateral review is because so many cases would be affected that it would constitute an unwarranted burden on the courts and the justice system. *See* pages 5-6, *supra*. As explained above, *see* pages 6-9, *supra*, such considerations are not appropriate under *Teague* in light of its intended departure from the Court's earlier ad hoc balancing test that included consideration of a rule's impact on the "administration of justice." *Teague*, 489 U.S. at 302. Having established a rule that attempted to create some measure of predictability by articulating in advance the legal determinations relevant to retroactive application, it would be counterproductive to permit those factors to influence the decision in a "hard" case.

In any event, even if it were appropriate to rely on the possible number of cases affected by a retroactivity ruling as a ground for refusing to give a rule retroactive effect, the practical impact of retroactive application of *Ring* and *Apprendi* is not what the State and its *amici* suggest. They disregard the numerous procedural hurdles that must be overcome by a criminal defendant seeking habeas corpus or other collateral relief. Moreover, the State and the United States both prominently cite numerous cases under 21 U.S.C. § 841 that have addressed the application of *Teague* to *Apprendi* (Pet. Br. 15, 29-30; U.S. Br. 13-14 & n.1), but they do not acknowledge the very limited relief that habeas petitioners have received in cases where lower courts have applied the rule retroactively.

1. The Court is well familiar with the myriad procedural hurdles in federal habeas corpus proceedings that make it unlikely that as many prisoners as the State suggests will be able to take advantage of *Ring* or *Apprendi*, if they are determined to be retroactive. Respondent is the unusual federal habeas petitioner who is litigating a first habeas petition, does not face a procedural bar for failure to raise his federal constitutional claim on direct appeal, and whose claims are not governed by the restrictions on relief established by Congress in 1996 under AEDPA. Most other defendants will face hurdles on some or all three fronts – a successive petition, procedural default, and AEDPA restrictions on timing and scope of relief.

Most significantly perhaps, a federal habeas petitioner, whether on an initial or successive petition, will often face the consequences of not having properly raised his federal constitutional claim on direct appeal. If the State relies on this affirmative defense and the prisoner has procedurally defaulted a claim, the claim may be raised on habeas review only if the prisoner can first demonstrate that there was "cause" for the default and that "prejudice" resulted, or that he is "actually innocent." *Bousley*, 523 U.S. at 622. This Court's decisions have made clear that those are not easy

standards to meet. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991).

In addition, in any case where the federal habeas petition was filed on or after April 24, 1996, the case is governed by AEDPA, which provides that habeas relief on claims adjudicated in state court is appropriate where the state court ruling was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by" this Court or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Also, state and federal prisoners would ordinarily have only one year within which to file a habeas corpus petition. *See* 28 U.S.C. §§ 2244(d), 2255.

2. For those defendants who overcome the various procedural hurdles on collateral review and establish that the constitutional error affected their sentence, relief is appropriate. But the fact is that, in many instances, including most all convictions under 21 U.S.C. § 841, relief would, at most, simply reduce extremely long terms of imprisonment to terms that are still lengthy.

The limited effect of retroactive application of *Apprendi* on criminal prosecutions is illustrated by review of lower court decisions that have applied *Apprendi* retroactively in cases involving convictions under the federal drug trafficking statute. *See* 21 U.S.C. § 841(b)(1)(A), (B). The limited universe of such cases is due to the appellate courts' subsequent rejection of such rulings, *see* Pet. Br. 15, 29-30, but similar results could be expected in other cases if this Court were to apply *Apprendi* retroactively.[5]

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[5] This Court has not yet decided the important question whether the type and quantity of a controlled substance is an element of the offense under 21 U.S.C. § 841. That issue is pending before the Court in *Goodine v. United States*, No. 03-596 (pet. filed Oct. 16, 2003). The NACDL filed an *amicus* brief in support of the petition demonstrating that Congress intended the threshold drug quantities set forth in Section 841(b) to constitute offense elements, based on the statutory language,

First, *Apprendi* does not undermine any maximum sentence that was increased based on a prior felony drug conviction in light of *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). The increase of a maximum sentence based on a prior conviction not found by a jury does not violate the Sixth Amendment under that precedent.[6]

Second, under *Harris v. United States*, 536 U.S. 545 (2002), the rule of *Apprendi* does not prohibit a judge, based on facts not found by the jury, from imposing an increased statutory mandatory minimum sentence that does not also increase the statutory maximum sentence.

Moreover, even within the universe of Section 841 cases where *Apprendi* would apply retroactively on collateral review, certain defendants have received no relief at all because the court found no *Apprendi* error. Such rulings have relied on a wide range of circumstances. In one case, the relevant facts regarding the type and quantity of drugs had been submitted to the jury at the original trial in 1986. *See Jackson v. United States*, 129 F. Supp. 2d 1053, 1069 (E.D. Mich. 2001), *rev'd on other grounds*, 45 Fed. Appx. 382 (6th Cir. 2002). That should be true in some other cases as well inasmuch as the Department of Justice initially recommended that drug type and quantity "be specified in the indictment and proven at trial." U.S. Dep't of Justice, *Handbook on the Anti-Drug Abuse Act of 1986*, at 20 (Mar. 1987).

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structure, and context, and the legislative history, and in light of the need to avoid the grave doubt as to the constitutionality of Section 841 that would otherwise arise under *Apprendi*.

[6] Indeed, even if the Court were to reverse *Almendarez-Torres*, evidence of a prior conviction, unlike evidence concerning the circumstances of the drugs underlying a conviction, would often be unassailable because the proof of such a fact through documentary evidence is so straightforward, except in such unusual circumstances as a defendant who claims that he is not the same person identified in the documentary evidence.

In addition, in other cases, courts have found other grounds for concluding that the error did not warrant habeas relief. Courts have concluded that the jury would have found the quantity of drugs beyond a reasonable doubt, *see Concepcion v. United States*, 181 F. Supp. 2d 206, 232 (E.D.N.Y. 2002), or that it was "inconceivable" that the jury would necessarily have found that the drug quantity was less than what the judge had found, *see Rosario v. United States*, 2001 U.S. Dist. LEXIS 13384, at *6-*7 (S.D.N.Y. Aug. 30, 2001). *But see United States v. Jordan*, 291 F.3d 1091, 1096-1097 (9th Cir. 2002) (suggesting government will have difficulty proving that error was harmless because "there are too many unknowns" regarding how defendant would have defended against allegations about drug quantity if it had been before the jury).

Other courts have relied on the fact that the defendant had been convicted on two counts of drug conspiracy resulting in a combined maximum sentence that exceeded the sentence imposed. *See United States v. Jenkins*, 333 F.3d 151, 155 (3d Cir.) (alternative holding), *cert. denied*, 124 S. Ct. 350 (2003); *United States v. Hernandez*, 137 F. Supp. 2d 919, 929-932 (N.D. Ohio 2001).

Still other courts have found harmless error because the sentence imposed did not exceed the 20-year statutory maximum sentence for the lesser offense involving any amount of most schedule I or II controlled substance under 21 U.S.C. § 841(b)(1)(C). *See McCoy v. United States*, 266 F.3d 1245, 1270 (11th Cir. 2001) (Barkett, J., concurring in result), *cert. denied*, 536 U.S. 906 (2002); *Rosario*, 2001 U.S. Dist. LEXIS 13384, at *6-*7; *Parise v. United States*, 117 F. Supp. 2d 204, 209 n.1 (D. Conn. 2000).

And in other cases, the court has reduced the sentence to that 20-year maximum. *See Darity v. United States*, 124 F. Supp. 2d 355, 360-361 (W.D.N.C. 2000) (384 months reduced to 240 months), *rev'd*, 22 Fed. Appx. 277 (4th Cir. 2001), *cert. denied*, 535 U.S. 1042 (2002); *see also United States v. Jones*, 2001 U.S. Dist. LEXIS 1740, at *15 (E.D.

La. Feb. 9, 2001) (where defendant had prior felony drug conviction, court reduced life sentence to 30 years' imprisonment, which is statutory mandatory for the lesser offense under Section 841(b)(1)(C) for defendant who has such a prior conviction). Of course, reduction of a drug conviction sentence to 20 years' imprisonment (or 30 years' for a recidivist) means that the original sentence imposed was exceptionally long, even under the draconian federal drug statutes, and such a reduction does not affect the sentence imposed for any other charge. *See United States v. Murphy*, 109 F. Supp. 2d 1059, 1066 (D. Minn. 2000) (300 months plus five year consecutive sentence under 18 U.S.C. § 924(c)(1) for use of a firearm, reduced to 240 months plus same five year consecutive sentence), *rev'd*, 268 F.3d 599 (8th Cir. 2001), *cert. denied*, 534 U.S. 1169 (2002).[7]

In sum, the circumstances of Section 841 cases are a far cry from the situation in *Bailey* and *Bousley*, where every conviction under the statute resulted in a mandatory, five-year sentence *consecutive* to any other sentence imposed. *See* 18 U.S.C. § 924(c)(1). Thus, every prisoner whose case fell within the *Bailey* ruling could make a threshold showing of prejudice because he necessarily received five additional years of imprisonment on that charge (subject, in some cases, to a partially offsetting adjustment under the Sentencing Guidelines). Yet, even with the widespread reliance by the federal government on that statute, neither the State nor the federal government demonstrate that collateral proceedings

[7] In addition to the quantity and type of controlled substance, a defendant's statutory maximum sentence may be increased in Section 841 cases to life imprisonment if "death or serious bodily injury results from the use of such [controlled] substance." 21 U.S.C. § 841(b)(1)(A), (B), (C). Such cases are not common and involve unusual evidence and proof connecting a particular drug transaction to use by a particular individual who was then seriously injured. In NACDL's view, such circumstances constitute elements of an aggravated drug offense, as they are generally treated, in fact, when prosecuted. And, of course, even in such circumstances, *Apprendi* would not affect any separate conviction for an independent federal offense involving violence or death.

concerning *Bailey* constituted an unwarranted burden on the federal courts.

Nor is there any evidence that habeas corpus petitions from state prisoners raising *Apprendi* claims will be a significant burden. Although the State's *amici* assert, in a conclusory manner, that "untold numbers" of state cases will be affected if *Apprendi* is held retroactive, Br. of Nebraska and 15 Other States as *Amici Curiae* 21, they fail to cite any evidence to that effect. The absence of evidence is particularly noteworthy because in Texas – one of the States that filed the *amicus* brief – the state's highest criminal court held more than two years ago that *Apprendi* applied retroactively in state habeas proceedings. *See Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001). Yet there is no sign in reported opinions or legal commentary that Texas courts have been unduly burdened by *Apprendi* claims. *Cf. Apprendi*, 530 U.S. at 564-565 (Breyer, J., dissenting) (noting that lack of evidence regarding potential effect of *Apprendi* "may suggest" that "concerns about disruption are overstated"). Denial of retroactive application of fundamental constitutional rights should not be premised on such unsubstantiated claims.

Under the settled principles of retroactivity developed in *Teague* and *Bousley*, the rules articulated by this Court in *Ring* and *Apprendi* should be applied to petitions for habeas corpus seeking relief for violations of those rules. "*Apprendi* is now the law, and its holding must be implemented in a principled way." *Ring*, 536 U.S. at 613 (Kennedy, J., concurring).

CONCLUSION

For the reasons set forth above and in the respondent's brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FEBRUARY 26, 2004